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No. 816

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

WILLIAM F. WAITE, *Petitioner,*

v.

COMMONWEALTH OF VIRGINIA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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January, 1965.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioner, William F. Waite, a resident of the Commonwealth of Virginia, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia, entered on October 9, 1964. The Supreme Court of Appeals of Virginia on said date rejected a petition for a writ of error to the Circuit Court of Franklin County, Virginia, on the ground that the judgment of the Circuit Court was "plainly right."

OPINIONS BELOW

The order of the Circuit Court of Franklin County, Virginia, is set forth in appendix, page 1a. The order of the Supreme Court of Appeals of Virginia, is reported in appendix, page 2a.

JURISDICTION

The petition for a writ of error and supersedeas was rejected by the Supreme Court of Appeals of Virginia by order dated and entered on the 9th day of October, 1964 (Appendix, page 2a). The jurisdiction of this Court is invoked under 28 U.S.C., § 1257(3).

THE QUESTION PRESENTED FOR REVIEW

1. Petitioner was convicted of operating a motor vehicle while under the influence of intoxicants upon the evidence of two police officers who were seated in a restaurant, one of whom saw petitioner park his vehicle in the restaurant's parking area, and enter the restaurant, but neither of whom testified as to the petitioner's manner of driving, nor his conduct while inside the vehicle, nor to the time interval between the parking of said vehicle and petitioner's alighting therefrom. The question is whether petitioner's federal constitutional rights were violated, that is to say, whether there was a deprivation of due process, and a denial of equal protection as guaranteed by the fourteenth amendment, from the failure of the prosecution to establish the essential element of the crime alleged.

THE CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS WHICH THE CASE INVOLVES

Article III, § 2 of the Constitution provides in pertinent part:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, ...".

The fourteenth amendment provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[1]

STATEMENT OF THE CASE

William F. Waite was arrested in October, 1961, for driving under the influence of intoxicants. At his trial, in the Circuit Court of Franklin County, Virginia, Officer Milliron testified that at approximately 12:30 a.m. on October 18, 1961, he and Trooper Holmes were seated in a "truck stop" fronting on U. S. Route 220, in Franklin County, Virginia; that as he, OfficerMilliron, was "looking straight out of the window"[2] of said "truck stop", he "observed this Studebaker station wagon pull up in front of the window and stopped."[3] He further testified, "I sat there and looked."[4] "He [petitioner] opened the door and got out of the station wagon."[5] There was no evidence as to how long he sat there and looked before defendant alighted, or as to what the defendant's actions were during that interval. Neither Officer Milliron nor any other Commonwealth witness offered any testimony as to petitioner's manner of driving, actions after the vehicle was parked, or time interval between parking and alighting.

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[1] U. S. Const. amend. XIV, § 1.

[2] Transcript, page 3.

[3] Transcript, page 3.

[4] Transcript, page 3.

[5] Transcript, page 3.

Officer Milliron further testified that petitioner came into the truck stop after getting out of his car. Both Officer Milliron and Trooper Holmes testified that petitioner displayed the characteristics of intoxication *at this time*, and that "Trooper Holmes placed him under arrest",[6] for driving while intoxicated. Upon this evidence petitioner was convicted.

ARGUMENT

1. A State Conviction of Crime Devoid of Evidentiary Support Is Unconstitutional Under the Due Process Clause of the Fourteenth Amendment.

The statute in effect on October 18, 1963, in Virginia, making it a crime to drive a motor vehicle while under the influence of intoxicants states that

> "It shall be unlawful for any person to drive or operate any automobile or other motor vehicle, car, truck, engine, or train while under the influence of alcohol, brandy, rum, whiskey, gin, wine, beer, lager beer, ale, portier, stout or any other liquid beverage or article containing alcohol, or while under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature".[7]

The burden was on Virginia, under the rulings of its own Supreme Court, to prove that petitioner was under the influence of intoxicants at the time that he was operating a motor vehicle; not after he got out of it. *Bland* v. *City of Richmond*, 190 Va. 42, 55 S.E. 2nd. 289 (1949). The evidence offered in support of this burden must be such as to exclude every reasonable

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[6] Transcript, page 4.

[7] Virginia Code § 18.1-54 (Amended 1950).

hypothesis of innocence. *Fowlkes* v. *Commonwealth*, 194 Va. 676, 74 S.E. 2d. 683 (1953).

The state's evidence in this case was that defendant's station wagon pulled up and stopped in the parking lot of a restaurant. There was no testimony as to his manner of driving, nor as to his behavior before he got out of his vehicle. *After* leaving the station wagon, he displayed the characteristics normally associated with intoxication, but there was no evidence as to the interval between the time that he parked his vehicle and alighted therefrom.

One reasonable hypothesis of innocence that arises from this evidence is that the defendant became intoxicated *between the time that he parked his car and got out of it.* This hypothesis could have been excluded by evidence that the defendant got out of his car immediately after he parked it. But the record is completely silent on this point, and proof of his condition after he got out of his vehicle is not proof of his condition while he was driving it, in the absence of any evidence as to the time that elapsed between the two events. *Fowlkes* v. *Commonwealth*, supra.

This Court has stated that

> "Our inquiry does not turn on a question of sufficiency of evidence to support a conviction, but on whether these convictions rest upon any evidence which would support a finding that the petitioners' acts caused a disturbance of the peace. In addition, we cannot be concerned with whether the evidence proves the commission of some other crime, for it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict

> him upon a charge for which there is no evidence to support that conviction.[8]

In the instant case evidence to support the conviction of *driving* while intoxicated was non-existent.

In *Thompson* v. *City of Louisville*[9] the only evidence of disorderly conduct was the testimony of a police officer that defendant was very argumentative after having been taken out of a cafe and arrested. This Court held the conviction for disorderly conduct to be devoid of evidentiary support as to lack constitutional vitality under the fourteenth amendment.

The same is true in petitioner's case, where the police officer admittedly observed petitioner driving into the parking lot of the restaurant concerned, but offered no testimony as to petitioner's manner of driving and parking his vehicle.

CONCLUSION

The only evidence of driving while intoxicated in this case is the testimony of two police officers limited to petitioner's conduct in the restaurant in which they were seated. There being no testimony as to petitioner's manner of driving, or parking, or as to the length of time he remained in the vehicle after parking, the conviction cannot consist with due process. The case is not a large one, but constitutional principles erode when that principle is the ideal, but a conviction such as this the reality.

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[8] *Garner* v. *State of Louisiana*, 368 U.S. 157 (1961).

[9] *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960).

For the foregoing reasons a writ of certiorari to review the judgment of the Court below should be granted.

Respectfully submitted,

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January, 1965.

APPENDIX

APPENDIX

Order of the Circuit Court of Franklin County, Virginia

Virginia: Circuit Court of Franklin County
February 5, 1963

Docket #7

COMMONWEALTH OF VIRGINIA

v.

WILLIAM FARRELL WAITE

This day came the attorney for the Commonwealth and the defendant in proper person and by his attorney and entered his plea of not guilty of driving under the influence as charged in the warrant in this case.

And thereupon came a jury, to wit: Gordon Reynolds, Otho Akers, G. G. Amos, R. Chester Naff and B. H. Ferguson who after being duly elected, tried and sworn the truth of and upon the premises to speak, and after having heard the evidence the instructions of the court and the arguments of counsel retired to their room to consider their verdict and after sometime returned into court with the following verdict, to wit:

> "We the Jury find the defendant guilty and fix his fine at $100.00. B. H. Ferguson, Foreman"

On motion of the attorney for the defendant that the verdict be set aside on the grounds that same was contrary to the law and the evidence, which motion the court overruled and the attorney for defendant signifying his intention to appeal to the Supreme Court of Appeals of Virginia, the court doth allow him sixty days to complete said appeal and post bond for $500.00.

A copy, Teste:

EDWIN GREER, *Clerk*

Order of the Supreme Court of Appeals of Virginia

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 9th day of October, 1964.

The petition of William F. Waite for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Franklin County on the 24th day of September, 1963, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A copy, Teste:

H. G. TURNER, *Clerk*